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IN THE SUPREME COURT OF

THE UNITED STATES

October Term, 1973

NO. 73-647

J. KENNETH JENSEN

Petitioner,

vs.

HERMAN O. GANT
Foreman of the Grand Jury,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

J. KENNETH JENSEN
Attorney at Law
7917 Ivanhoe Avenue
La Jolla, California 92037

Counsel for Petitioner

IN THE SUPREME COURT OF

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PETITIONER prays that a Writ of Certiorari issue to review the Judgment of the Court of Appeal of California denying Petitioner a Writ of Mandate, June 19, 1973.

OPINION BELOW

The Opinion of the California Court of Appeals, not reported, appears in the Appendix. Petitioner's request for a hearing in the California Supreme Court was denied July 18, 1973. A copy of the Denial is appended to this petition.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U. S. Code §1257(3).

QUESTION PRESENTED

Where a citizen, represented by an attorney, has evidence of crimes committed by government officials, do procedural rules of a grand jury which withhold from him the free access to the grand jury enjoyed by the district attorney deny equal protection of the law?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision invoked is Section 1 of the Fourteenth Amendment, which provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

1. On the afternoon of May 4, 1973, Larry Bonamo was riding a customized Harley-Davidson motorcycle, which belonged to petitioner. He was stopped by San Diego Police Officer P. A. Mueller who was on duty with two teen-age girls in his patrol car. In order to impress his teen-age companions, and to terrify a long-haired, bearded motorcycle rider, Mueller drew his gun and pointed it at Larry's head, then ordered him to lie on the ground. The officer told Larry he was a bank robbery suspect to justify this armed assault, even though he knew it was not true.

2. When Officer Mueller discovered that petitioner was the owner of the motorcycle, he told Larry he would give him ten minutes to get petitioner there with the registration papers, or he would seize the motorcycle as a stolen vehicle. This bank robbery suspect was then allowed to go unaccompanied to the nearest telephone booth, three or four blocks away, to call petitioner's law office and inform him of the officer's threat.

A short time later, petitioner arrived at the scene of the stop and produced documents of ownership and vehicle registration. The police officer immediately seized these, together with the motorcycle, and refused to return them to petitioner.

3. The police admitted they had nothing to indicate that the motorcycle was stolen, but they seized petitioner's vehicle and documents to provoke petitioner into resisting their conduct. A towing truck arrived and the police ordered the motorcycle fastened to the truck and towed away, even though petitioner warned them it was an expensive machine and fastening it to the back of the tow truck in that fashion would cause damage.

4. The next day petitioner phoned the San Diego Police Department and Officer Guisti told him he had seen the report and would check it out in a few days.

5. On Monday morning, May 7, 1973, petitioner went to the office of the City Attorney, where Deputy City Attorney George Wetzel called

Officer Guisti and requested release of petitioner's motorcycle. Officer Guisti asked to speak to petitioner and thereupon told him he did not intend to release the motorcycle. The deputy city attorney apologized and told petitioner he could not help him.

6. On Wednesday morning, May 11, 1973, petitioner moved the Superior Court of California in and for the County of San Diego for the return of the illegally seized property. He was denied the motion on the basis that no criminal charges were pending against him. The Court of Appeals of California upheld this ruling.

7. Petitioner proceeded to the office of the District Attorney to confer with Deputy Terry J. Scott, and, while in his office, he was joined by one of the chief deputies, Nicholas Kasimatis. Petitioner requested that proceedings be instituted against the officers for their conduct against Larry Bonamo and petitioner, but he was told by Chief Deputy Kasimatis that the District Attorney would not do anything because the police always have cause for what they do and particularly if the petitioner was

involved.

8. On the morning of May 16, 1973, petitioner went with Larry Bonamo to the Grand Jury Room in the San Diego County Courthouse. There petitioner asked the secretary-receptionist to speak to the grand jury foreman. At first she refused because she recognized petitioner as an attorney and told him he would not be permitted to either enter the grand jury room or speak to the foreman. Then, at petitioner's insistence, she did summon the grand jury foreman, Herman O. Gant, to the reception room, where petitioner and Larry requested a hearing to present evidence before the grand jury as victims of criminal conduct by the San Diego police officers. The grand jury foreman, Herman O. Gant, told petitioner that only members of the District Attorney's office were permitted to present evidence of crimes before the grand jury and victims were not permitted the same access to the grand jury enjoyed by the district attorney and under no cricumstances would petitioner be allowed to testify.

9. Petitioner applied to the California Court of Appeal for a Writ of Mandate to permit him to present evidence to the grand jury. The petition was denied on June 19, 1973. Thereafter, petitioner's request for a hearing in the California Supreme Court was denied on July 18, 1973.

REASONS FOR GRANTING THE WRIT

1. The grand jury must afford citizens the same access enjoyed by the district attorney and not subject the citizen to procedural barriers wherein his grievance may be denied consideration before reaching the grand jury itself. Creating a special class, the district attorney's office, exempt from the procedures is a violation of equal protection of the law.

2. The district attorney in his discretion can prevent the prosecution of crimes. For that reason, the grand jury was conceived to return indictments for the commission of public offenses if the prosecuting agency of the state in its own self interest refused to do so.

3. For this to be a republic in which no

men are above the law, the institution of the grand jury must be receptive to hear evidence of crimes wherever they occur.

Therefore, petitioner requests this Court to issue a Writ of Certiorari ordering the San Diego Grand Jury to allow petitioner to present evidence of criminal activity before it in the same manner afforded the District Attorney or, impose upon the District Attorney the same restrictions enjoining the petitioner.

Respectfully submitted,

J. KENNETH JENSEN
Counsel for Petitioner

APPENDIX

IN THE SUPREME COURT OF

THE UNITED STATES

October Term, 1973

NO. _____

J. KENNETH JENSEN

Petitioner,

vs.

HERMAN O. GANT
Foreman of the Grand Jury

Respondent.

CERTIFICATE OF SERVICE

I, J. KENNETH JENSEN, being first duly sworn, depose and say:

I hereby certify that on October 11, 1973 a copy of this petition for a Writ of Certiorari was mailed, postage prepaid, to Respondents Lloyd M. Harmon Jr., County Counsel and the California Supreme Court. I further certify that all parties

required to be served have been served.

J. KENNETH JENSEN
Counsel for Petitioner

Duly witnessed and sworn before me this 11th day of October, 1973.

NOTARY PUBLIC

OFFICIAL SEAL
DONNA M. HANSON
NOTARY PUBLIC-CALIFORNIA
PRINCIPAL OFFICE IN
SAN DIEGO COUNTY
My Commission Expires May 18, 1976

COURT OF APPEAL — STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

Court of Appeal - Fourth Dist.
FILED
JUN 19 1973
JOHN R. McDOWELL, Clerk
Deputy Clerk

DIVISION ONE

J. KENNETH JENSEN,

vs.

HERMAN O. GANT, ETC.

4 Civil NO. 12706

SUPERIOR COURT NO. - - - -

BY THE COURT:

The petition for writ of mandate is denied on the ground Jensen has failed to follow the procedure outlined in the answer for presenting complaints to the grand jury.

P.J.

Copies to: J. Kenneth Jensen-La Jolla
County Counsel-SD

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

JUL 18 1973

I have this day filed Order

HEARING DENIED

In re: 4 Civ. *No.* 12706

Jensen

vs.

Gant

Respectfully,

G. E. BISHEL
Clerk

J. Kenneth Jensen, Esq.
7917 Ivanhoe Ave.
La Jolla, Ca. 92037

No. 75-647

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA FOURTH APPELLATE DISTRICT

BRIEF FOR RESPONDENT IN OPPOSITION

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No. 73-647

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

J. KENNETH JENSEN,
Petitioner,
vs.
HERMAN O. GANT,
Foreman of the Grand Jury,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

BRIEF FOR RESPONDENT IN OPPOSITION

PRELIMINARY STATEMENT

Petitioner seeks a Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate District, to review that court's opinion filed June 17, 1973 denying his Petition for Writ of Mandate to Herman O. Gant, Foreman of the Grand Jury of the County of San Diego. A Petition for Hearing in the Supreme Court of the State of California was denied on July 18, 1973. A copy of the order of the Supreme Court of California

and the opinion of the Court of Appeal are appended to the Petition for Writ of Certiorari docketed in this Court on October 12, 1973.

JURISDICTION

Jurisdiction in the Petition is invoked pursuant to Title 28, United States Code, Section 1257(3).

QUESTION PRESENTED

The Petition raises the following question (as phrased by Petitioner): Where a citizen, represented by an attorney, has evidence of crimes committed by government officials, do procedural rules of a grand jury which withhold from him the free access to the grand jury enjoyed by the district attorney deny equal protection of the law?

CONSTITUTIONAL PROVISION INVOKED

Petitioner alleges denial of rights guaranteed under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF FACTS

At or about 8:55 a.m. on or about May 17, 1973, the secretary to the Grand Jury of the County of San Diego advised Respondent Herman O. Gant that Petitioner was personally in the office of the Grand Jury and wished to talk to him. This request was made approximately five minutes before the Grand Jury was scheduled to convene for a regular session for the conduct of its business. Petitioner requested that he be allowed to personally present to the Grand Jury at that time evidence of alleged criminal activity. The facts or the nature of this alleged criminal activity were not

discussed with Respondent. Respondent Gant informed Petitioner that neither the statutes of the State of California nor the rules of procedure of the Grand Jury of the County of San Diego permitted such a practice. However, Respondent Gant advised Petitioner that he could submit his complaint in writing to the Grand Jury setting forth the alleged criminal activity and that such complaint would be referred to and investigated by an appropriate committee of the Grand Jury. No such complaint was received by the Grand Jury from Petitioner.

ARGUMENT

I

CERTIORARI SHOULD NOT BE GRANTED IN THIS CASE SINCE NO SUBSTANTIAL FEDERAL QUESTION EXISTS SINCE THE EQUAL PROTECTION OF THE LAWS DOES NOT REQUIRE UNIFORMITY OF PROCEDURE AND THE DECISION OF COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, RESTS ON ADEQUATE INDEPENDENT STATE GROUNDS.

The Grand jury under California law is an arm of the judiciary and its purpose is as much to protect the citizen against unfounded charges as it is to make charges when there is sufficient evidence of guilt (*Matter of Tyler* [1884] 64 Cal. 434, 437; *United States* v. *Dionisio* [1973] 410 U.S. 1, 35 L.Ed.2d 67; 81 ft.nt.15: see also *Kennedy* and *Briggs, Historical and Legal Aspects of the California Grand Jury System,* 43 Calif.L.Rev. 251 [1955]). The provisions relating to the powers and duties of the grand jury are found in the California Penal Code (Pen. Code, § 888 et seq.). The grand jury "may inquire into all public offenses committed or triable within the county and present them to the court by

indictment" (Pen. Code, § 917). Investigation is made in the first instance upon complaint made either by the district attorney, by a grand juror or by a private citizen (*People* v. *Lawrence* [1863] 21 Cal. 368, 373). In the instant proceeding, Petitioner contends that he has a right to "present evidence" before the Grand Jury. Obviously, Petitioner has no such right nor does Respondent have any duty to allow him to personally appear and present such evidence.

The statutes of California are clear that except as expressly authorized the sessions of the grand jury are private and that no person is permitted to be present during the session of the grand jury except the members and witnesses actually under examination (Pen. Code, §§ 939 and 939.1; see also: *People* v. *Rojas* [1969] 2 Cal.App.3d 767, 769-770; see also Rule 6, F.R.Cr.P.). Petitioner, unlike the district attorney, has no right to appear before the grand jury to present a case (Pen. Code, § 935). The only way an unauthorized person may be called before or attend upon a grand jury session is that of witness during the actual taking of his own testimony (*People* v. *Brown* [1927] 81 Cal.App. 226, 248).

Petitioner's contention that he (or his client) has been denied equal protection of the laws since "the grand jury must afford citizens the same access enjoyed by the district attorney" overlooks the principle established by this court that the equal protection clause does not exact uniformity of procedure (*Dohany* v. *Rogers* [1929] 281 U.S. 362, 369, 74 L.Ed. 904, 912). The fact that the district attorney is charged with the detection of crime and prosecution of criminal cases supports a difference of procedure (Gov. Code, §§ 26500 and 26501). In any event, Petitioner has failed to allege that he complied with the procedures established by the Grand Jury of the County of San Diego for the bringing

of complaints before the Grand Jury. Petitioner was not refused access to the Grand Jury. Respondent Gant merely advised him that any complaint would have to be presented to the Grand Jury in accordance with the laws and procedures applicable to the Grand Jury.

II

CERTIORARI SHOULD NOT BE GRANTED IN THIS CASE BECAUSE IT IS NOT CLEAR FROM THE RECORD THAT A FEDERAL QUESTION WAS RAISED BEFORE AND DECIDED BY THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, AND THEREFORE THERE IS INSUFFICIENT BASIS TO SUPPORT JURISDICTION IN THE UNITED STATES SUPREME COURT.

Based upon a review of the record before the United States Supreme Court it is not clear that a federal question was raised and decided by the Court of Appeal of California, Fourth Appellate District. Petitioner has failed to comply with the provisions of Rule 23(1)(f) of the Supreme Court Rules. The Petitioner requested the Court of Appeal to issue a Writ of Mandate to Respondent directing that Petitioner be permitted to present evidence of criminal activity to the Grand Jury for their consideration. Respondent answered such Petition. The Court of Appeal denied the Petition for Writ of Mandate "on the ground Jensen has failed to follow the procedure outlined in the answer for presenting complaints to the grand jury" (Pet. [App.]).

The Writ of Mandate is granted only under the provisions of sections 1085 and 1086 of the California Code of Civil Procedure. Under California law a person seeking a Writ of Mandate must

demonstrate that he is clearly entitled to the Writ before it will issue (*Parker* v. *Bowron* [1953] 40 Cal.2d 344, 351). Issuance of the Writ is discretionary (*Pettis* v. *Municipal Court* [1970] 12 Cal.App.3d 1029, 1031). Petitioner did not advance any federal constitutional question in either his Petition for Writ of Mandate filed in the Court of Appeal or in his Petition for Hearing in the California Supreme Court. Also it is clear that the opinion of the Court of Appeal rests on an adequate non-federal ground, i.e. Petitioner had not complied with the procedures of the Grand Jury applicable to the filing of complaints by private citizens.

CONCLUSION

It is the crucial test to the exercise of certiorari jurisdiction that the controlling issue in the state court must be a federal issue and that such issue must meet the substantial question test, that the federal question must have been properly raised in the state court and that the state court decision does not rest on an independent state ground. It is clear that the Petitioner herein does not present the requisites to warrant the exercise of certiorari jurisdiction by the United States Supreme Court.

Even if it be concluded that the constitutional issue was properly raised and was the basis for the decision of the California court, the question should not be considered as substantial to warrant the granting of certiorari.

Therefore, Respondent respectfully urges that this honorable Court deny the Petition sought herein.

Respectfully submitted,

ROBERT G. BERREY, *County Counsel*
County of San Diego

BY JOSEPH KASE, JR., *Assistant*
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302 County Administration Center
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Attorneys for Respondent

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

J. KENNETH JENSEN,
Petitioner,
vs.
HERMAN O. GANT,
Foreman of the Grand Jury,
Respondent

Certificate of Service

I hereby certify that on this 26th day of November, 1973, three copies of the Brief for Respondent in Opposition were mailed, postage prepaid, to each of the following named persons:

J. Kenneth Jensen, Esq.
7917 Ivanhoe Avenue
La Jolla, California 92037

I further certify that all parties required to be served have been served.

ROBERT G. BEEREY, *County Counsel*
County of San Diego

BY JOSEPH KASE, JR., *Assistant*
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